

**NO. 06-20-00071-CV**

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**IN THE COURT OF APPEALS FOR THE SIXTH  
DISTRICT OF TEXAS**

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**WALMART INC., *Appellant***

**v.**

**FINTIV, INC., *Appellee.***

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On Appeal from the 71<sup>st</sup> Judicial District Court, Harrison County, Texas  
Cause No. 18-1378  
Hon. Brad Morin, Presiding

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**APPELLEE'S BRIEF**

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### **REQUEST FOR ORAL ARGUMENT**

Appellee believes the extensive written record and transcripts of the lengthy proceedings before the trial court provide a sufficient basis for the Court to decide this appeal without oral argument. However, if the Court grants Appellant's request for oral argument, Appellee requests equal time to respond to Appellant's arguments.

## **RECORD REFERENCES**

### **Citations in this Brief to the parties are as follows:**

Appellant Walmart, Inc. will be referred to as “Walmart” or “Appellant.”

Appellee Fintiv, Inc. will be referred to as “Fintiv” or “Appellee.”

Appellant Walmart, Inc. and Appellee Fintiv, Inc. will collectively be referred to as the “Parties.”

### **Citations in this Brief to the record are as follows:**

CR – Clerk’s Record (i.e. CR1 at [page]; e.g. CR1 at 1)

RR – Reporter’s Record (i.e. RR1 [page]; e.g. RR1 at 1)

Supp. RR – Supplemental Report’s Record (i.e. Supp. RR1[page]; e.g. Supp. RR1 at 1)

## **ISSUES PRESENTED**

- I. Did the trial court properly determine that Walmart, Inc. did not satisfy its burden of establishing that the forum selection provision contained in a 2008 nondisclosure agreement between Fintiv and Walmart Stores, Inc. applies to the claims asserted in this action?
- II. Did the trial court properly conclude that Texas has personal jurisdiction over Walmart, given the disclosure of trade secrets at meetings in Texas, the Texas residency of its agent MCX, its use of Fintiv's trade secrets in Texas, and its significant and pervasive presence in the State of Texas?

## **PRELIMINARY STATEMENT**

Walmart's efforts to evade adjudication of this action in Texas – where much of its wrongful conduct took place – were properly rejected by the trial court and should be rejected on appeal. Under Texas law, if the record contains a mere scintilla of evidence to support the trial court's denial of the special appearance, the appeal must fail. Similarly, a writ of mandamus can only issue if there is a clear abuse of discretion. Ample evidence in the record here supports the trial court's denial of the special appearance motion, and therefore the appeal should be dismissed, and the writ denied.

Contrary to Walmart's claim that Fintiv and Walmart "struck an agreement" when they began the discussions that led to this suit (Appellant's Opening Brief ["AOB"] at 16), Walmart and Fintiv's relationship began in 2000 – 8 years before the nondisclosure agreement on which it bases its special appearance – and spanned over 14 years. Over the course of the relationship, Walmart strung Fintiv along, representing that it intended to partner with Fintiv, and inducing Fintiv to reveal the specific details of the mobile wallet technology (to Walmart and to its agent MCX), that Fintiv had invested millions in developing. After securing Fintiv's trade secrets – directly and through MCX – Walmart terminated the relationship – only to launch Walmart Pay in 2015, unlawfully incorporating the technology Fintiv presented to Walmart/MCX.

Although Walmart now attempts to distance itself from MCX, Walmart does not dispute that it took part in creating MCX, had employees working at MCX and serving on MCX's Board of Directors, and – perhaps most importantly – that Walmart directed Fintiv to work with MCX.

In the course of jurisdictional discovery – demanded by Walmart – Fintiv secured an affidavit from Walmart's former executive, Scott Sandlin, who headed up Walmart's mobile payment initiative. Mr. Sandlin described the lengthy relationship between Walmart and Fintiv and stated that the confidential and proprietary technical information disclosed by Fintiv to Walmart and MCX were “instrumental in Walmart's successful creation of a mobile payments business.” He also stated he believed Walmart incorporated Fintiv's mobile wallet technology into Walmart's financial services offerings. Mr. Sandlin further stated that this confidential information was disclosed at meetings with Walmart and MCX in Dallas, TX, and that Walmart had relevant meetings with Fintiv in Texas, through his departure from Walmart in 2014. Mr. Sandlin revealed that he had discussed these very facts with Walmart's counsel, who nevertheless persisted in pursuing Walmart's special appearance.<sup>1</sup> Mr. Sandlin's declaration alone is adequate to support the trial court's ruling.

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<sup>1</sup> This issue is the subject of a potential motion for sanctions against Walmart, which the parties have agreed to resolve in the regular course of the case. Fintiv reserves the right to seek all appropriate relief with respect to this issue.

Because it cannot explain away this evidence, Walmart attempts to distract the Court by focusing on Fintiv’s filing of an Amended Petition – *which was based on facts uncovered through the very jurisdictional discovery Walmart demanded*. It is undisputed that under Texas law, a party not only has an absolute right to amend its petition, but that the amendment entirely supersedes the prior petition, giving it no further force or effect. Critically, statements in a superseded petition are not judicial admissions under Texas law and therefore not relevant in any way. There is nothing improper about the Amended Petition, and no relevance to any alleged inconsistencies.

Indeed, it is Walmart’s position that has been inconsistent, and a moving target throughout its challenge to jurisdiction. Walmart’s initial moving papers disavowed the existence of a signed and binding 2008 NDA. Only on reply did Walmart suddenly characterize the 2008 NDA as dispositive. However even then, Walmart failed to present any evidence to the trial court that the 2008 NDA – which was signed by Walmart ***Stores***, Inc. – applies to Walmart, Inc., the defendant in this action. Walmart’s effort to do so on appeal is too little too late. Walmart also demanded jurisdictional discovery regarding meetings between the parties after December 2013, characterizing such meetings as “significant” and related testimony “pivotal” because such meetings would fall outside the scope of the 2008 NDA. Then, for the first time in its July 22, 2020 reply brief, Walmart claimed that even if

meetings occurred in 2014, such meetings would extend the duration of the NDA, rather than fall outside its scope. Finally, Walmart implicitly conceded that Fintiv's allegations regarding MCX would fall outside the 2008 NDA, focusing on disavowing its agency relationship with MCX. Now, for the first time on appeal, Walmart contends that even if MCX were its agent, the 2008 NDA would apply to MCX as well. None of these contradictory positions merit consideration.

The trial court properly refused to apply the forum selection clause in the 2008 NDA to Fintiv's claims. First, Fintiv's disclosures to Walmart's agent, MCX, which were subject to a separate NDA that superseded any prior agreements and does not contain a forum selection clause. Despite Walmart's claim that MCX was not its agent, Walmart admitted to having overlapping employees, including engineers working on MCX's product. The evidence presented to the trial court supports Fintiv's allegation that Walmart deployed MCX as its agent to secure trade secret information from Fintiv, which it later incorporated into Walmart Pay. Walmart cannot circumvent the NDA in this manner only to turn around and argue – for the first time on appeal – that the 2008 NDA actually applies to MCX as well. Second, the 2008 NDA does not apply to Fintiv's misappropriation claims under Texas law because they arise from a lengthy confidential relationship between the parties and would exist “but for” the NDA. Common law and the Texas Uniform Trade Secrets Act afford relief to Fintiv for Walmart's wrongful conduct, separate and apart from

the 2008 NDA. Third, the 2008 NDA does not apply to the trade secrets disclosed (and later misappropriated) after the NDA expired in December 2013, or before it was executed in 2008.

The trial court also properly implicitly rejected Walmart's arguments that it is not subject to specific jurisdiction, in light of the substantial evidence connecting the claims in this suit to the State of Texas. Fintiv alleges – and Walmart concedes – that the offending product (Walmart Pay) is sold and marketed with the State of Texas and within Harrison County, Texas. Evidence regarding the numerous meetings in Texas over the course of the relationship, and Walmart's strong presence in the State of Texas is more than sufficient to support the exercise of specific jurisdiction. Though Fintiv does not believe it is necessary to reach the issue of general jurisdiction, if any foreign defendant is “at home” in Texas, it is Walmart. It is one of the largest private employers in the state, and operates over 600 stores in the State of Texas.

Walmart's appeal and its alternative request for a writ of mandamus should be denied.



## **STATEMENT OF FACTS**

### **A. The Parties**

Fintiv<sup>2</sup> is a Texas company, headquartered in Austin, TX, and a leader in mobile wallet technology.<sup>3</sup> Fintiv invested tens of millions of dollars in research and development, including research into mobile payment technology. At the core of Fintiv’s digital commerce technology is Fintiv’s proprietary MoTEAF™ (Mobile Transaction Ecosystem Architecture Framework), a plug-and-play technology platform designed to support the various technology and process platforms using open application programming interfaces (“APIs”). (CR4 at 1145, ¶14.)

Walmart is the largest corporation in the United States. It provides everything from groceries to entertainment to sporting goods to oil changes and serves people across the United States, from large cities to rural communities. As of the filing of this action, Walmart maintained approximately 600 stores in Texas, including 393 Supercenters—the largest number of any state—and employed approximately 160,970 people. (CR2 at 340-342.) Walmart’s Texas stores spend

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<sup>2</sup> Fintiv has had several corporate predecessors, including Affinity Global Services, LLC, Mobile Media Group and Mozido, Inc. The record refers to these other names on a few occasions, but it is undisputed that Fintiv is the correct plaintiff in this case. The nondisclosure agreement discussed by the parties was signed by Walmart Stores, Inc. and Fintiv’s predecessor Affinity Global Services, LLC.

<sup>3</sup> Walmart’s erroneous contention that Fintiv is not registered to do business in Texas and has not filed an assumed name certificate (Appellant’s Opening Brief [“AOB”] at 19, n. 1) will be addressed in response to its Motion to Abate, and is not relevant to this appeal.

billions with suppliers. (CR2 at 340-342.) It is one of the largest private employers in the state. <https://www.businessinsider.com/the-biggest-employer-in-every-us-state-2017-11>.

**B. Walmart and Fintiv’s Relationship Began Years Before the 2008 NDA<sup>4</sup>**

Former Walmart executive Scott Sandlin was a Walmart employee for over 26 years, from 1988 to June 2014. (CR4 at 941-942, ¶2.) Mr. Sandlin submitted an affidavit in support of Fintiv’s supplemental opposition.

Mr. Sandlin explained that he worked in Walmart’s Financial Services business from 2002-2014, and led Walmart’s mobile payments initiative. (CR4 at 941-942, ¶¶2-3.) Early in the initiative, he came into contact with Fintiv, who he described as the leading player in the industry at the time. He stated that Walmart was just beginning to explore the concept of mobile payments at the time, and that Walmart knew “very little about” mobile payments prior to “meeting, working with, and learning from Fintiv.” (CR4 at 942-943, ¶5.) Indeed, at a 2002 meeting between Fintiv and senior Walmart executive Doug McMillon, who currently serves as Walmart’s President and CEO, Mr. McMillon stated “everything we know in mobile is because of Mozido.” (CR4 at 1148-1149, ¶¶31-32.)

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<sup>4</sup> Walmart acknowledges prior discussions with Fintiv, but erroneously claims Walmart and Fintiv’s predecessor executed an NDA in 2001 (AOB at 23.) The NDA is between an individual – Michael Liberty – and Walmart Stores, Inc. (CR2 535.)

Mr. Sandlin explained that as Walmart's interest in mobile payments and mobile applications grew, Walmart's mobile payments business team expanded. (CR4 at 942, ¶3.)

**C. Walmart Sought Out Texas Companies to Potentially Partner On a Mobile Project**

In 2008, Walmart Stores, Inc. and Fintiv entered into a nondisclosure agreement ("NDA"), "in connection with [the] proposed business relationship" concerning the creation of a mobile wallet product. Walmart also solicited Austin-based mPower and another company, Obopay, to submit proposals regarding a potential partnership. (CR2 at 269 (Tr. 35:5-24, 35:25-36:7).)

In furtherance of the potential purported partnership, Fintiv hosted a three-day meeting in August 2010 at its Dallas office with Walmart's top executives and corporate officers, including Jane Thompson, the founder of Walmart Financial Services and "ultimate decision-maker" with "signatory rights to bind" Walmart. (CR2 at 265 (Tr. 18:5-16), 269 (Tr. 36:16-20, 37:23-38:1), 276 (Tr. 62:16-63:6, 65:18-67:5), 284 (94:7-96:8).) Fintiv gave a comprehensive presentation about its proprietary mobile wallet technology platform and how it could be implemented within Walmart's mWallet. (CR2 at 300-328, 276 (Tr. 62:15-63:25), 284 (Tr. 94:14-95:17).) The presentation detailed how Fintiv's proprietary mobile wallet platform integrated a full suite of functionalities in mobile payment, shopping, marketing, and transaction-based analytics. (CR2 at 329-332.) Walmart and Fintiv

met again in Dallas on September 16, 2010 to continue their discussions. (CR2 at 333-337.)<sup>5</sup>

Notably, the selection of Dallas for the meetings was purposeful on Walmart's part. Fintiv's then-CEO had offered to hold the August 2010 meeting in Atlanta. Walmart selected Dallas for the meeting location. (CR2 at 282 (Tr. 88:4-20).)

In December 2010, Walmart informed Fintiv that it decided to partner with Obopay for the mobile wallet project. (CR2 at 270 (Tr. 38:6-39:19).) This decision constituted the "cessation of unsuccessful negotiations" regarding the project for purposes of the 2008 NDA, pursuant to Paragraph 2(a) of the agreement. *See, e.g.*, RR at 19. Walmart later abandoned the project, as after development and discovery, the Obopay project was not cost effective. (CR2 at 270 (Tr. 38:6-39:19).)

**D. Walmart and Fintiv Enter Into New Discussions After Walmart Abandons the Obopay Project**

Walmart and Fintiv subsequently entered into new discussions regarding Fintiv's technology, which was continuously evolving. In connection with these

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<sup>5</sup> Walmart contends that no witnesses recalled the September 2010 meeting (AOB at 24), but it is documented by materials produced in discovery. (CR2 at 333-337; CR4 at 935.)

new discussions, Walmart Stores, Inc. and Fintiv prepared a new September 15, 2011 NDA.<sup>6</sup>

In June 2012, Michael Love became Mozido's chief technology officer and executive vice president. (CR4 at 949-950 (Tr. 6:10-14, 7:4-8).) He was tasked with taking Mozido's architecture to the next level, and creating "an all-encompassing architecture called MoTEAF™, that could incorporate everything [they] had done so far but could also provide the blueprints for the additional development that had to be done. (CR4 at 952 (Tr. 16:4-10).)

Love testified he was aware of Walmart and Mozido's interactions prior to his joining the company. He recalled one meeting that he attended with Walmart in Arkansas in 2012. However, as he explained, Walmart sent Fintiv in another direction – to its agent, MCX. (CR4 at 968 (Tr. 53:15-20), 1003-1004 (Tr. 115:8-116:5).)

#### **E. Walmart Directs Fintiv to Its Agent, MCX**

In 2012, Walmart launched Merchants Customer Exchange ("MCX"), a consortium of retailers headquartered in Dallas and formed to develop a mobile

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<sup>6</sup> (CR1 at 56-59.) It is unclear whether Walmart Stores, Inc. ever signed the September 2011 NDA. Nonetheless, as discussed below, the preparation of the NDA is significant because it evidences the parties' understanding that the 2008 NDA was no longer operative. The 2011 NDA contains a Delaware forum selection clause.

payments product. (CR4 at 964-965 (Tr. 46:17-47:20), 967-970 (Tr. 52:25-55:24), 985 (Tr. 74:21-23), 986 (Tr. 75:4-6).) Walmart exercised substantial control over MCX, including over its board of directors – to the point that Fintiv employees understood Walmart and MCX to be one and the same. (CR4 at 985-986 (Tr. 74:21-75:6), 1012 (Tr. 124:2-4).) Indeed, Walmart admits that its employees overlapped with MCX’s during the relevant time period. (AOB at 25.) Walmart’s executive also acknowledged that Walmart engineers contributed to “early internal development work for MCX.” (CR1 at 43, ¶9.)<sup>7</sup>

After MCX’s formation, Walmart executives Mike Cook and Jamie Henry instructed Fintiv – and specifically, Mike Love – to continue its discussions regarding Fintiv’s technology with MCX instead of Walmart directly. (CR4 at 968 (Tr. 53:15-20), 1003-1004 (Tr. 115:8-116:5).) MCX and Fintiv executed an NDA on or about August 28, 2012. (CR4 at 932, fn. 10.)

Fintiv gave Walmart/MCX a comprehensive technology presentation in Dallas in September 2012, at which Fintiv detailed several unique features of its technology, which expanded on existing QR technology to include functions such as applying loyalty promotion items, encrypting credit card information, and single use token innovation. (CR4 at 957-958 (Tr. 38:9-39:10), 959-960 (Tr. 41:23-42:3),

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<sup>7</sup> Indeed, while Walmart complains that Fintiv’s original petition never even mentioned MCX, its executive Daniel Eckert volunteered this information in support of Walmart’s opening brief on its special appearance. *Id.*

961-964 (Tr. 43:18-46:11), 971-973 (Tr. 58:12-60:15), 974-976 (Tr. 61:25-63:23), 981-984 (Tr. 69:4-72:24), 989-990 (Tr. 87:4-88:1), 992 (Tr. 91:6-24), 993 (Tr. 95:3-7), 994-995 (Tr. 96:24-97:22).) One of the individuals who attended the meeting was Dodd Roberts, who Love understood to report to Walmart's Mike Cook. (CR4 at 963-964 (Tr. 45:19-46:11).)

Unbeknownst to Fintiv, Walmart was simultaneously working with a different mobile wallet company. Discussions between Walmart/MCX and Fintiv continued until February 2014, when Walmart officially announced it was partnering with another company (Paydiant) instead of Fintiv for development of its mobile wallet. (CR4 at 1001 (Tr. 113:6-25, Depo Ex. 15).)

**F. Walmart Launches Walmart Pay, Misappropriating Fintiv's Trade Secrets and Technology**

In 2015, Walmart launched "Walmart Pay." Walmart claims to have launched Walmart Pay less than 11 months after the idea was conceptualized. (CR2 at 274 (Tr. 55:12-15).) It is undisputed that Walmart Pay is provided to shoppers in its Texas stores. (CR2 at 452-459.)

Fintiv's executive, Mike Love, testified that upon seeing how Walmart Pay worked, his first thought was that it "looked a lot like" what Fintiv had communicated to Walmart/MCX. (CR4 at 954 (Tr. 35:16-17), 966 (Tr. 50:8-12).) He identified Walmart Pay's QR code technology as one of the specific pieces of misappropriated technology, specifically for the purpose of "leveraging QR code to

communicate between the point of sale and the mobile app.” (CR4 at 957 (Tr. 38:9-25).) Mr. Love testified that Fintiv specifically disclosed proprietary information regarding innovation at the checkout process.<sup>8</sup> (CR4 at 989 (Tr. at 87:4-20).)

Mr. Love’s testimony was corroborated by Mr. Sandlin’s affidavit. Mr. Sandlin stated that he believed the confidential information Fintiv revealed to Walmart (and to MCX, discussed below) was “instrumental to Walmart’s successful creation and growth of its mobile payments business.” (CR4 at 942-943, ¶5.) He further stated that he believed Fintiv’s confidential information, revealed to Walmart (and/or MCX) at meetings in Dallas, may have ended up in Walmart’s financial services product offerings. (CR4 at 943, ¶¶6-7.)

### **PROCEDURAL BACKGROUND**

On December 14, 2018, Fintiv filed its original petition against Walmart for a common law claim of misappropriation of trade secrets and violation of the Texas Uniform Trade Secrets Act (“TUTSA”). On March 3, 2019, Walmart filed its Special Appearance to Object to Jurisdiction.

On September 5, 2019, Fintiv filed its Response in Opposition to Walmart’s Special Appearance to Object to Jurisdiction. On September 10, 2019, Walmart filed a Reply in Support of its Special Appearance. On September 13, 2019, the trial court held a hearing on the special appearance, but the hearing was adjourned to

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<sup>8</sup> Walmart itself describes Walmart Pay as a “checkout system.” (AOB at 19.)



permit additional discovery, at Walmart's request. Walmart took the depositions of three current and former Fintiv executives.

On June 19, 2020, Walmart filed a Supplemental Brief in Support of its Special Appearance. Fintiv filed an opposition brief to the Walmart Supplemental Brief on July 15, 2020, supported by the affidavit of former Walmart executive Scott Sandlin. Walmart filed a Reply to the Opposition on July 22, 2020.

Fintiv filed its Amended Petition on July 22, 2020, alleging the same causes of action, but amending numerous allegations based on the information revealed in the discovery process. Walmart did not file an amended special appearance after the Amended Petition was filed.

Walmart filed a Supplemental Brief regarding Plaintiff's Amended Petition on July 27, 2020. On July 29, 2020, the Court heard extensive oral arguments from both Parties regarding the Special Appearance.

On August 31, 2020, the Court entered its Order Denying Defendant's Special Appearance. On September 17, 2020, Walmart filed its Request for Findings of Fact and Conclusions of Law. The trial court did not issue findings of fact and conclusions of law. Walmart did not file a notice of past due findings of fact and conclusions of law.

On September 21, 2020, Walmart filed its notice of appeal.

## **SUMMARY OF THE ARGUMENT**

As the party seeking to invoke the forum selection clause in the 2008 NDA, Walmart had the burden of establishing its validity and applicability to the claims at issue. Walmart failed to satisfy that burden.

The 2008 NDA does not apply to Fintiv's claims for several reasons.

First, Fintiv alleges that Walmart used Dallas-based MCX to secure trade secret information from Fintiv, in a deliberate effort to circumvent its obligations under the 2008 NDA. Such conduct is necessarily outside of the scope of the 2008 NDA. The separate nondisclosure agreement between Fintiv and MCX contains no forum selection clause, and superseded any prior agreements.

Second, Fintiv's claims exist "but for" the 2008 NDA and therefore are outside its scope. Fintiv is not bringing claims for breach of the nondisclosure agreement, but rather common law and statutory claims for misappropriation of trade secrets, based on trade secrets disclosed over the course of the parties' lengthy relationship. As Walmart's former executive Scott Sandlin confirmed, Walmart knew next to nothing about mobile payments before the relationship began in 2000, and the confidential information it learned from Fintiv was "instrumental" in Walmart's creation of a successful mobile payments business. Walmart stole Fintiv's trade secrets to develop its own payment application with a third party, providing no compensation whatsoever to Fintiv.

Third – as was undisputed in the parties’ briefing on the special appearance—the nondisclosure agreement expired in 2013, three years after Walmart informed Fintiv of its decision to select another business partner for its mobile project in 2010.<sup>9</sup> Walmart and Fintiv then separately began mobile payment discussions in 2011, which continued into 2014. The parties treated these discussions as distinct from the 2008 NDA, as evidenced by the preparation of a new NDA in September 2011 (which does not contain an Arkansas forum selection clause). Because the information exchange occurred outside the scope of the 2008 NDA, the forum selection clause does not apply.

Accordingly, the only relevant inquiry is whether the court has jurisdiction over Walmart. The record reflects that it does.

Numerous facts in the record support the exercise of specific jurisdiction over Walmart and the claims brought by Fintiv. Walmart sought out Texas companies to partner with to develop a mobile wallet. Walmart executives met with Fintiv to discuss its mobile wallet technology multiple times in Dallas. During these meetings and over the course of their long-standing business relationship, Walmart readily accepted Fintiv’s confidential intellectual property, developed by Fintiv after years of research and investing tens of millions of dollars. Walmart uses and profits from

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<sup>9</sup> *See, e.g.*, CR3 at 791.

the offending product, Walmart Pay, throughout its hundreds of Texas stores, including stores in Marshall, Texas.

Walmart further directed its agent, MCX (a Texas resident), to meet with Fintiv in Dallas to discuss the mobile wallet platform. At these meetings and presentations, Fintiv disclosed confidential and proprietary trade secrets to Walmart and MCX, including but not limited to a plan for utilizing MoTEAF™ as a means to extend product offerings to mobile payments, based on the expectation they would partner in the development of a mobile application. Instead, Walmart used what it learned from Fintiv directly and through MCX indirectly to develop Walmart Pay,<sup>10</sup> misappropriating the trade secrets and taking advantage of the long-standing relationship between the parties.

Though Fintiv believes it is unnecessary to reach the question of general jurisdiction, the factual record also supports the exercise of general jurisdiction over Walmart. Walmart indeed appears to be more at home in Texas than in its “home” states of Arkansas and Delaware. It is one of the largest private employers in the state, and maintained over 600 stores as of the filing of the petition – significantly more than its 130 stores in the state of Arkansas. (CR2 445.) Even under the

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<sup>10</sup> Mr. Sandlin also stated he believed Fintiv’s technology may have been incorporated in other products: Walmart Money Card and the Walmart Money Card mobile application. (CR4 at 943, ¶7.) Fintiv will explore this issue further in discovery.

Supreme Court's more stringent standard for general jurisdiction, Walmart's pervasive presence in the State of Texas are sufficient to confer general jurisdiction.

Because Walmart failed to satisfy its burden of showing that the 2008 NDA applies to Fintiv's claims and because the record provides ample support for the exercise of jurisdiction over Walmart, this court should affirm the trial court's denial of Walmart's special appearance.

## **ARGUMENTS AND AUTHORITIES**

### **I. STANDARD OF REVIEW**

#### **A. The defendant bears the burden of negating all bases for jurisdiction on a special appearance.**

In a suit against a nonresident defendant, the plaintiff has the initial burden of proof to plead sufficient allegations that the defendant is covered by the Texas long arm statute. *See Motor Car Classics, LLC v. Abbott*, 316 S.W.3d 223, 229 (Tex. App.—Texarkana 2010, no pet.) (citing *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010)). Upon filing a special appearance, the defendant assumes the burden of negating all bases for jurisdiction alleged by the plaintiff. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 80 (Tex. 2002) (citing *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985)). If a special appearance is denied, the courts of appeals conduct a *de novo* review of the trial court’s findings. *Am. Type Culture Collection*, 83 S.W.3d at 806.

Whether the court has jurisdiction is a question of law, but in resolving that question, the court frequently resolves questions of fact. *Id.* at 805-806. “When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied.” *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *see also Stelly v. Tarr*, 344 S.W.3d 26, 29 (Tex. App.—Texarkana 2011, no pet.) (stating that appellate courts “imply all findings of fact necessary to

support the trial court’s judgment that are supported by evidence.”); *see also Renfro Drug Co. v. Lewis*, 149 Tex. 507, 513, 235 S.W.2d 609, 613 (1950) (“In seeking to determine whether there is any evidence to support the judgment and the implied findings of fact incident thereto ‘it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature.’”); *see also Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15, 21 (Tex. App.—Texarkana 2012, no pet.). If there is a challenge to the legal sufficiency of the ruling and there is more than a scintilla of evidence to support the finding, the challenge fails. *Id.* Additionally, deference will be given to the trial court to resolve conflicts in the evidence and to determine the weight of given testimony. *Paragon Indus. Applications, Inc. v. Stan Excavating, LLC*, 432 S.W.3d 542, 549 (Tex. App.—Texarkana 2014, no pet.).

**B. Enforcement of a forum selection clause is reviewed under an abuse of discretion standard.**

The enforcement of a forum selection clause is reviewed for an abuse of discretion. *Clark v. Power Mktg. Direct, Inc.*, 192 S.W.3d 796, 798 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 610 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). Interpretation of the clause is reviewed *de novo*.

As the party seeking to enforce the forum selection provision, Walmart had the burden of establishing that the 2008 NDA applies to Fintiv’s claims. *Int’l Metal*

*Sales, Inc. v. Glob. Steel Corp. & Glob. Steel Corp.*, 03-07-00172-CV, 2010 WL 1170218, at \*3 (Tex. App.—Austin Mar. 24, 2010, *pet. denied*); *HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc.*, 565 S.W.3d 799, 805 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2018, no *pet.*). An order denying an objection to jurisdiction should be affirmed where the defendant “failed to negate all bases of personal jurisdiction.” *Lathrop v. Personalysis Corp.*, No. 14-06-00074-CV, 2006 WL 3072072, \*9 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no *pet.*).

Mandamus relief should be denied absent a “clear abuse of discretion” by the trial court. *See, e.g., In re Stutsman*, No. 06-20-00072-CV, 2020 WL 6494797, \*1 (Tex. App.—Texarkana Nov. 5, 2020, *pet. denied*).

## **II. THE 2008 NONDISCLOSURE AGREEMENT DOES NOT GOVERN FINTIV’S CLAIMS AGAINST WALMART.**

The record readily supports the trial court’s denial of Walmart’s special appearance, and implicit finding that the 2008 NDA does not apply to Fintiv’s claims. First, Walmart did not meet its threshold burden of showing that the NDA applies to Walmart, Inc. – despite being executed by Walmart Stores, Inc. Second, even if the 2008 NDA applies to Walmart, Inc., Walmart did not meet its burden of demonstrating that the NDA applies to Fintiv’s trade secret misappropriation claims.

Indeed, the record contains ample support for the conclusion that the 2008 NDA does not apply to Fintiv’s claims. First, Fintiv alleges that Walmart deliberately circumvented the NDA by deploying its agent, MCX, to secure trade secret



information from Fintiv, which it then secured from MCX and incorporated into Walmart Pay. Second, Fintiv's claims are based on common law and the Texas Uniform Trade Secrets Act, and would therefore exist "but for" the existence of the 2008 NDA. Third, Fintiv's claims based on disclosures made after the NDA expired in December 2013 are necessarily outside of the NDA.

Walmart does not and cannot show that the NDA 1) sets forth binding terms regarding the subject matter of the dispute, 2) is legally essential to Fintiv's claims, and 3) is the factual predicate to Fintiv's claims. (AOB at 31.)

**A. Walmart's misappropriation of Fintiv's trade secrets through its agent MCX is outside of the scope of the NDA.**

Fintiv's Amended Petition alleges that in 2012, Walmart instructed Fintiv to continue discussions regarding its technology with a Texas company, MCX. (CR4 at 1144, ¶10.) Fintiv alleges that, based on Walmart's direction, it provided confidential and trade secret information to MCX at a September 2012 meeting. (CR4 at 1150-1151, ¶42.) Fintiv alleges that MCX participated in the meeting as Walmart's agent, and conveyed the trade secret information revealed at the meeting back to Walmart, which Walmart later incorporated into Walmart Pay. *Id.* The 2008 NDA is irrelevant to Fintiv's misappropriation claim based on MCX.

*1. Conduct specifically designed to evade the NDA cannot be considered within the NDA.*

The record supports Fintiv's claim that Walmart enlisted MCX to acquire additional trade secret information from Fintiv for the very purpose of circumventing its obligations under the 2008 NDA, and that MCX acted as Walmart's agent with respect to its dealings with Fintiv.

Fintiv's chief technology officer and executive vice president Michael Love testified at his deposition that after the formation of MCX, Walmart had specifically directed Fintiv to work with MCX regarding the mobile wallet. (CR3 at 968 (Tr. 53:15-20), 1003-1004 (Tr. 115:8-116:5).) He testified that MCX personnel in attendance at meetings with Fintiv reported to Walmart, and that based on his dealings with Walmart and MCX, he understood MCX and Walmart to be one in the same. (CR4 at 985-986, 1012.) Fintiv provided at a detailed presentation of the latest developments in its technology to 2012 – based on this direction from Walmart. (*See supra*, p. 11.)

Mr. Sandlin stated his belief that Fintiv confidential information “disclosed to Walmart (and/or MCX) by Fintiv in meetings in Dallas, Texas” may have been used in Walmart's financial services offerings such as Walmart Pay. *See, e.g.*, CR4 at 943, ¶7. Mr. Love testified that Walmart Pay looked a lot like what Fintiv had communicated at the 2012 meetings with MCX. (CR4 at 954 (Tr. 35:16-17), 966 (Tr. 50:8-12).)

This conduct – on the part of MCX and Walmart – is necessarily not governed by the 2008 NDA, nor is the 2008 NDA legally essential to or a factual predicate for the claim. The conduct alleged readily satisfies the elements of a misappropriation of trade secrets claim, including the requirement that Walmart discovered the information relayed to MCX by improper means and without authorization. The 2008 NDA cannot be deemed to authorize conduct designed to circumvent its terms, as Walmart appears to suggest. (AOB at 49.) Mr. Love’s January 2020 testimony made clear that the disclosures made to MCX and their ultimate likely incorporation into Walmart Pay and other products will be the major focus of this dispute – not a mere ancillary issue as Walmart attempts to argue.

2. *The record supports Fintiv’s agency allegations.*

The evidence sufficiently supports Fintiv’s allegation that MCX acted with actual or apparent authority of Walmart.

Under Texas law, an “agency relationship may be found from underlying facts or direct and circumstantial evidence showing the relationship of the parties.” *Elite Towing, Inc. v. LSI Fin. Grp.*, 985 S.W.2d 635, 643 (Tex. App.—Austin 1999, no pet.). “An agent's authority to act on behalf of a principal depends on some ***communication by the principal***, either to the agent, as the basis for actual or express authority, or ***to a third party, as the basis for apparent or implied authority***.” *Paragon*, 432 S.W.3d at 548 (emphasis added). To determine if an agent has

apparent authority, a court will examine the conduct of the principal, reliance of the party alleging the authority, and the reasonableness of their assumption that the agent had authority. *Id.* at 550.

Here, Walmart's communications to Fintiv regarding MCX establish a credible basis for MCX's apparent authority as Walmart's agent. Walmart directed Fintiv to work with MCX. Walmart was instrumental in MCX's formation. Walmart maintained a presence on its Board. Walmart admits that it "lent some of its employees" to MCX. (AOB at 25.) Walmart's Senior Vice President Daniel Eckert also admitted in a declaration that Walmart engineers worked on MCX's mobile product development. (CR1 at 43, ¶9.) MCX and Fintiv negotiated and discussed Fintiv's mobile wallet technology at Walmart's direction. These facts support the existence of actual or apparent authority.<sup>11</sup> Any purportedly conflicting evidence (AOB at 64) was properly weighed and resolved by the trial court, and deference must be given to the trial court's resolution of conflicting facts. *Paragon*, 432 S.W. 3d at 549.

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<sup>11</sup> Walmart erroneously argues that Fintiv failed to carry its burden of proof on its agency allegation. (AOB at 63.) But to defeat a special appearance, it is not necessary for a plaintiff to *prove* apparent authority, as the court looks to the pleadings or results of the discovery process. Tex. R. Civ. P. 120a. The court in *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) found there was no evidence in the record at all of agency. In contrast here, Fintiv identified numerous facts supporting actual or apparent authority of MCX to act as Walmart's agent.

Because MCX was not subject to the 2008 NDA containing the Arkansas forum selection clause, the forum selection clause is inapplicable to MCX's conduct in misappropriating the trade secrets conveyed at the 2012 Dallas meeting.

3. *Walmart waived the argument that the 2008 NDA would apply to MCX as its agent because it did not argue that position in the trial court.*

For the first time on appeal, Walmart argues that if MCX was its agent, then the 2008 NDA would apply to MCX, based on the inclusion of “agents” in the definition of “Representatives.” (AOB at 32, 48–49.) This argument was never raised at the trial court level. Under well-established Texas law, the argument cannot be raised for the first time on appeal and was waived. *See* Texas Rule of Appellate Procedure 33.1 (stating complaints and objections presented for appellate review must have been made to the trial court); *see e.g., Coleman v. Klockner & Co. AG*, 180 S.W.3d 577, 587 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (“[A]bsent fundamental error, an appellate court has no discretion to reverse an otherwise error-free judgment based on a new argument raised for the first time on appeal.”) (citing *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 (Tex. 1992)).

Even if Walmart's argument had been preserved for appeal – which it plainly was not – the 2008 NDA still does not apply because Fintiv and MCX entered into a separate NDA (containing no forum selection clause), on or about August 28, 2012, which specifically provides that it “expresses the entire understanding of the parties

with respect to its subject matter, *and supersedes any prior agreements with respect thereto.*” (MCX NDA at ¶13(e) (emphasis added)).<sup>12</sup> The 2008 NDA therefore cannot apply to MCX.

Nor can Walmart succeed in the absurd claim that the 2008 NDA would govern its conduct in indirectly securing Fintiv trade secrets through MCX. The 2008 NDA contemplates direct exchange of information, not a subversive effort by Walmart to indirectly secure trade secret information through MCX. It is unconscionable for Walmart to now allege that the NDA and its forum selection clause apply when it did everything to deliberately evade the rest of its terms.

Because MCX’s conduct, as the agent of Walmart, forms a substantial basis of the underlying suit and it is not governed by the 2008 NDA, the trial court’s implicit finding that the forum selection clause does not apply to Fintiv’s claims should be affirmed.

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<sup>12</sup> Fintiv offered to provide the MCX NDA to the trial court for *in camera* review, since it was designated confidential. CR4 at 932, n. 10. Because the trial court did not request review of the NDA, it did not become part of the record on appeal. If the Court considers Walmart’s (waived) argument, Fintiv requests leave to supplement the appellate record with the MCX NDA for the purpose of rebutting this new argument.

**B. Fintiv's claims regarding Walmart's direct acquisition and misappropriation of Fintiv's trade secrets exist but for the 2008 NDA.**

The 2008 NDA is further inapplicable because Fintiv's claims are based on common law and the Texas Uniform Trade Secrets Act, not breach of the NDA. Under Texas law, a forum selection clause should be declined force if – as here – the claims stand alone and exist “but for” the agreement containing the forum selection clause. *In re EOG Res., Inc.*, No. 12-18-00054-CV, 2018 WL 3197612, \*5 (Tex. App. – Tyler June 29, 2018, no pet.).

Statutory and common law claims for misappropriation of trade secrets do not require contracts between the parties. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134A.002. When a confidential relationship between parties exists and trade secrets are disclosed in confidence, the nondisclosing party has a “duty to keep [the] secret.” *See Kana Energy Servs., Inc. v. Jiangsu Jinshi Mach. Grp. Co.*, 565 S.W.3d 347, 352 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2018, no pet.) (“As used in a claim for misappropriation of trade secrets, . . . ‘confidential relationship’ means a relationship in which the owner of a trade secret discloses it ‘in confidence so as to place the other party under a duty to keep his secret.’”) (quoting *Furr's Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 459 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.). The existence of a confidential relationship can be proven by

examination of the facts and is not dependent on the existence of a nondisclosure agreement, as Walmart suggests (AOB at 45).

Here, Fintiv alleges and the evidence supports a long-standing confidential relationship between the parties going back to 2000— long before the 2008 NDA was even executed. As Walmart’s executive Scott Sandlin explained, when Walmart and Fintiv were first introduced, Fintiv was a “leading mobile payments company” and Walmart knew “very little” about mobile payments. This is significant because the Amended Petition asserts that Fintiv provided Walmart with “confidential intellectual property developed by Fintiv” *over the course of their long-standing business relationship*. (CR4 at 1145, ¶13.) (Emphasis added.) The 2008 NDA cannot be construed as legally essential to or a factual predicate for a relationship that spanned over a decade. Walmart’s claim that the 2008 NDA establishes terms of a relationship that started 8 years earlier (AOB at 38-39) is nonsensical. Nor is review of the 2008 NDA necessary to determine if Walmart’s misuse of information acquired over the course of the relationship and through MCX was without authorization. (AOB at 41-43.)

It is also plain from the 2008 NDA and the parties’ conduct that it was not intended to apply or understood to apply to any disclosures after 2010, when Walmart decided to partner with Obopay. The 2008 specifically states it is entered into in connection with a “proposed business relationship” – the one that Walmart concedes



it declined to enter into with Fintiv in 2010 when it selected Obopay as its partner instead. (AOB at p. 24.) Indeed, when Walmart and Fintiv began new discussions regarding mobile technology in 2011, they prepared a new NDA, dated September 15, 2011. (CR1 at 55-59.) While it is unclear whether Walmart ever signed the 2011 NDA, its preparation confirms that the parties considered the new discussions outside the scope of the 2008 NDA.

The lengthy relationship and history between the parties makes Walmart's cited authorities inapposite. Walmart heavily relies on the *Pinto Tech Ventures v. Sheldon* and *In re Bambu Franchising LLC* to support its proposition that the NDA governs the underlying dispute. (AOB at 37.) However, both *Pinto Tech* and *In re Bambu* are readily distinguishable from this case.

First, neither case addresses trade secret misappropriation claims. Second, in both cases, the relationship between the parties ***did not exist prior to or independent of the contracts containing the forum selection clauses.***

The *Pinto* plaintiffs were shareholders and suing based on the dilution of their interest related to shareholder agreements. *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 432 (Tex. 2017). The Court found that their claims “ultimately, and actually depended on the existence of the 2010 Amended Shareholder Agreement,” as the case involved the validity of the amended agreement and the facts involved the parties’ authority to act under the amended agreement. *Id.* at 441.

*In re Bambu* addressed claims brought by a franchisee against a franchisor. The court found that the claims “[arose] from the business relationship that was struck through the agreements” because without the franchise agreements, the parties had no relationship whatsoever. *In re Bambu Franchising LLC*, 05-17-00690-CV, 2017 WL 4003428, at \*3 (Tex. App.—Dallas Sept. 12, 2017, no pet.).

Fintiv’s causes of action, in contrast, are based on the longstanding relationship it had with Walmart, preceding and continuing after the expiration of the 2008 NDA. The 2008 NDA was not the origination of the relationship between the parties, as were the contracts in *Pinto Tech* and *Bambu*. Even if the NDA did not exist, Fintiv would still have viable claims based on the long relationship between the parties, unlike the parties in *Pinto Tech* and *Bambu*. As shown above, a claim for misappropriation of trade secrets and violation of TUTSA do not require a contract between the parties. Tex. Civ. Prac. & Rem. Code § 134A.002. Fintiv’s “claims that Walmart ‘acquired, disclosed and used’ Fintiv’s trade secrets” (AOB at 47) are not limited to information exchanged under the 2008 NDA – if it even applies to Walmart, Inc. Fintiv’s claims pass the but-for test put for in *Pinto Tech*, as they are viable regardless of the NDA.

Fintiv’s claims are that Walmart improperly acquired the trade secrets owned by Fintiv “under the pretense of launching a business venture”—not that Walmart breached its obligations pursuant to the NDA. By alleging that the NDA is the only

thing that matters, Walmart ignores the eight years of discussions prior to the NDA being signed, and the negotiations after it expired. Unlike the facts in *Pinto* and *Bambu*, the operative facts alleged by Fintiv show that the parties had a “long-standing business relationship” over the course of many years, during which Fintiv “provided Walmart with access to confidential intellectual property” under the pretense that Walmart would be partnering with Fintiv. Fintiv alleges that Walmart misappropriated Fintiv’s trade secrets and used them with a third party to develop Walmart Pay, breaching the confidential trust between the Parties. *Pinto* and *Bambu* are not controlling.

Reference to the terms of the 2008 NDA is therefore not necessary to determine Fintiv’s claims, the parties’ duties created by the NDA are not operative facts of Fintiv’s claims, and it cannot be said that “but for” the 2008 NDA, Fintiv’s controversy would not exist. Statutory and common law claims of misappropriation of trade secrets are not a “dispute arising from” the NDA. Fintiv’s claims are independent of the existence of the NDAs, thus, it cannot be said that “but for” the NDA Fintiv does not have a claim against Walmart.

The trial court’s implicit determination that Walmart did not meet its burden of proving that Fintiv’s claims could not exist “but for” the 2008 NDA is supported by the evidence and should be upheld.

**C. The 2008 NDA does not apply to conduct after its December 2013 expiration.**

The 2008 NDA is also inapplicable because the parties agreed it terminated in December 2013, three years after Walmart decided to partner with Obopay, pursuant to section 2(a) of the NDA. Walmart's eleventh hour argument that the NDA did not terminate in December 2013 was waived. *See Gen. Serv. Comm'n v. Little-Tex. Insulation Co.*, 39 S.W.3d 591, 598, n. 1 (Tex. 2001).

In the parties' first round of briefing on the special appearance, Fintiv's opposition asserted that its claims were based in part on conduct after the NDA expired in December 2013, which was therefore outside the scope of the NDA. (CR1 at 232.) In reply, Walmart argued Fintiv failed to produce evidence of disclosures after December 2013. (CR2 at 519.) At the September 13, 2019 hearing on the special appearance motion, Fintiv presented witnesses to testify regarding meetings between the parties that occurred after the NDA expired in December 2013. Walmart requested that the proceedings be adjourned so that it could take discovery regarding the post-2013 meetings, which the court granted. (Supp. RR at 44.)

Walmart's supplemental brief following the discovery specifically characterized this testimony as "potentially significant" because it pertained to information exchanged following the December 2013 expiration of the NDA. (CR3 at 791.) Walmart's brief discussed the testimony regarding 2012 meetings between Walmart and Fintiv, concluding that the "uncontroverted evidence" showed

Walmart had no contact with Mozido/Fintiv after 2013, and that therefore all meetings took place while the 2008 NDA was in effect.

Fintiv’s supplemental opposition brief provided further evidence of post-2013 meetings, through an affirmation from Walmart’s former executive Scott Sandlin, who stated that meetings continued through at least early 2014. Mr. Sandlin also stated that he had shared this information previously with Walmart’s counsel. (CR4 at 925-943.)

In the face of this evidence, Walmart suddenly advanced an entirely new argument in its July 22, 2020 supplemental reply brief on the special appearance motion: that if meetings had occurred in 2014, such meetings would mean the NDA did not expire until 2017, based on section 2a of the NDA. Notably, the argument comes after several pages of argument refuting the evidence of post-2013 meetings. (CR4 at 1055-1058.) And indeed, at the July 29, 2020 oral argument, Walmart began by referring to the year 2013 as “the expiration of that 2008 nondisclosure agreement.”). *See* RR at 5-6.

The trial court implicitly rejected this new and unfounded argument. First, Walmart waived the argument by failing to raise it prior to its *fourth* brief on the special appearance. *Larsen*, 835 S.W.2d at 74.<sup>13</sup> Second, even if not waived, the

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<sup>13</sup> Walmart acknowledges that an argument a party “fail[ed] to adequately brief or develop” at the trial court level is waived. (AOB at 51, n. 5.)

argument fails because the 2008 NDA does not sweepingly apply to any and all information exchanged between Walmart and Fintiv. Instead, it specifically provides that it was entered into “in connection with a proposed business relationship” between the parties. While this proposed business relationship is undefined, the parties – by their conduct and their arguments before the trial court prior to the July 29 hearing – plainly interpreted this to mean that the 2008 NDA only applied to the negotiations for an initial proposed partnership, which terminated in 2010 when Walmart informed Fintiv that it was partnering with Obopay. Had Walmart construed the NDA in any other way, the jurisdictional discovery that delayed the proceedings from September 2019 to July 2020 would have been entirely unnecessary, because it all pertained to meetings after December 2013.

Accordingly, the information exchanged in 2012 and thereafter between Fintiv and Walmart and Fintiv and MCX was not subject to the 2008 NDA.<sup>14</sup>

#### **D. Fintiv’s Original Petition Is Irrelevant**

Walmart’s focus on a statement in Fintiv’s original petition that the action arises out of the parties’ NDAs (notably, not just the 2008 NDA) is completely improper and misleading. Fintiv amended its petition based on the factual record

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<sup>14</sup> For this reason, Walmart’s argument that Fintiv relies on meetings from 2010 (AOB at 50) that “indisputably” occurred before the confidentiality obligations expired is yet another distraction. Even if the NDA applies to those meetings, there is ample evidence of conduct outside its scope to support the claims alleged by Fintiv here.

developed since the filing of the original petition. Under well-settled Texas law, parties are permitted to freely amend petitions, and the superseded pleading ceases to have any effect, and does not constitute a judicial admission. *See, e.g., Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (“When a pleading has been abandoned, superseded, or amended, it ceases to be a ‘live’ pleading and no longer provides a judicial admission.”) (citing *Kirk v. Head*, 152 S.W.2d 726, 729 (Tex. 1941)). The original petition has been superseded, and is legally irrelevant. *Kirk*, 152 S.W.2d at 729. The amended petition is the only live and relevant pleading before the Court, and in that pleading Fintiv’s cause of action does not arise out of the NDAs. Walmart’s reliance of the superseded petition is improper under Texas law.

### **III. TEXAS HAS PERSONAL JURISDICTION OVER WALMART.**

Because the trial court properly implicitly found the forum selection clause in the 2008 NDA did not apply, the only relevant inquiry is whether the record supports the exercise of jurisdiction over Walmart. The answer is yes.

To determine whether personal jurisdiction exists over a nonresident defendant, a court generally considers two inquiries: (1) whether the exercise of personal jurisdiction satisfies the forum state’s long-arm statute; and (2) whether the exercise of personal jurisdiction is consistent with due process. *See Spir Star AG v. Kimich*, 310 S.W.3d 868, 872 (Tex. 2010). The Texas long-arm statute reaches “as

far as the federal constitutional requirements for due process will allow.” *Id.* (citation omitted). Therefore, the two inquiries collapse into a single inquiry of whether the exercise of personal jurisdiction comports with due process. Due process is satisfied if the nonresident defendant has established minimum contacts with the forum state; and the exercise of jurisdiction over the defendant does not offend the traditional notions of fair play and substantial justice.<sup>15</sup> *See id.* “A defendant’s contacts with a forum can give rise to either specific or general jurisdiction.” *Id.*

“A court has specific jurisdiction over a defendant if its alleged liability arises from or is related to an activity conducted within the forum.” *Id.* at 873. Further, “specific jurisdiction ‘may be asserted when the defendant’s forum contacts are isolated or sporadic, but the plaintiff’s cause of action arises out of those contacts with the state.’ . . . In such cases, [the court] focus[es] on the ‘relationship among the defendant, the forum[,], and the litigation.’” *Id.* (citations omitted). Moreover, the exercise of specific jurisdiction is proper “when (1) the defendant’s contacts with the forum state are purposeful, and (2) the cause of action arises from or relates to the defendant’s contacts.” *Id.*

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<sup>15</sup> Walmart has never alleged that Texas’s exercising personal jurisdiction over it would violate the notions of fair play and substantial justice; therefore, it is not discussed in this brief.



**A. The record supports the exercise of specific jurisdiction over Walmart**

Fintiv's trade secret misappropriation claim has a substantial connection with Walmart's contacts with Texas. First, Walmart purposefully availed itself of the privilege of conducting activities within Texas when it first began its relationship with Fintiv in 2000, and when it later solicited Texas companies for a potential partnership for Walmart's "mWallet" project. Walmart sent its executives to meetings in Dallas to discuss the development of the mWallet. The Texas citizenship of Walmart's agent, MCX, is also imputed to Walmart, and its directive to Fintiv to meet with MCX is further evidence of purposeful availment. Fintiv's claims arise from these contacts with the State of Texas, and from Walmart's efforts to profit from the offending product in the State of Texas. Under the Texas Supreme Court's decision in *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013), the contacts evidenced by the record here are sufficient to confer specific jurisdiction over Fintiv's trade secret misappropriation claims. *Id.* at 154 (finding two meetings in Texas concerning a proposed joint venture at which trade secrets were disclosed sufficient to confer specific jurisdiction over misappropriation claims).

1. *Walmart purposefully availed itself of the privilege of doing business in Texas.*

(a) *Walmart specifically targeted Texas companies, including Fintiv, to develop its mobile payment technology business.*

Walmart purposefully availed itself of the privilege of conducting business in Texas, by targeting and pursuing Texas companies to develop its mobile wallet. In 2000, Walmart set out to learn all it could about mobile payment technology – by developing and cultivating a relationship with Fintiv, the leader in the field. This relationship continued as Walmart’s leadership pursued development of a mobile payments business. (CR4 at 942, ¶3.)

Walmart later solicited both Fintiv’s predecessor Mozido and Austin-based mPower as the top three finalist companies to be considered for the mobile wallet project.

(b) *Walmart sent executives to Dallas meetings.*

Walmart purposefully and intentionally sent its top executives—including corporate officers with the right to bind Walmart to transactions<sup>16</sup>— to Dallas to meet with Fintiv on at least two occasions: in August and September 2010. In fact, Walmart rejected Fintiv’s offer to hold the meeting in Atlanta, Georgia, citing Dallas, Texas as a more convenient location. (CR2 at 282 (Tr. 88:4-20).) At the

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<sup>16</sup> (CR2 at 265 (Tr. 18:5-16); 269 (Tr. 36:16-20, 37:23-38:1); 276 (Tr. 62:16-63:6, 65:18-67:5); 284 (94:7-96:8).)

face-to-face meetings, Fintiv's trade secret mobile payment technology was disclosed to Walmart's representatives. These facts alone support the exercise of specific jurisdiction. *See Moncrief Oil*, 414 S.W.3d at 154; *see also Spir Star*, 310 S.W.3d at 873. Mr. Sandlin also attested to additional meetings in Texas through 2014. (CR4 at 942, ¶4.)

(c) *Walmart directed its agent, MCX, to meet with Fintiv in Texas.*

Walmart made further purposeful contacts with the State of Texas through its agent, MCX.

MCX was created by Walmart and headquartered in Dallas. MCX met with Mozido in Dallas at the direction of Walmart. There can be no question that MCX—whose principal office was in Dallas during the relevant time period—is subject to specific (and general) jurisdiction in Texas. Critically, “[f]or purposes of personal jurisdiction, the actions of an agent may be attributed to the principal.” *Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549 n. 4 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (finding trial court erred in granting special appearance to object to jurisdiction where evidence indicated apparent authority of agent, and agent's contacts were sufficient to establish specific jurisdiction).

After Walmart formed MCX, it directed Fintiv to begin working with MCX to continue developing mWallet. Fintiv subsequently gave presentations to MCX in

Dallas – at which individuals who reported to Walmart executives were present – and explained the latest features of Fintiv’s trade secrets and propriety technology. Fintiv alleges – supported by the affidavit of Walmart’s former executive Scott Sandlin – that MCX then relayed the information it learned from Fintiv back to Walmart, which used it to develop Walmart Pay. Mr. Love testified that he was struck by the similarities between Walmart Pay and the technology discussed at meetings with MCX. MCX’s conduct in Dallas with respect to Fintiv is imputed to Walmart and dispositive of the specific jurisdiction analysis.

2. *Fintiv’s Claims Arise From and Relate to Walmart’s Contacts With Texas.*

Fintiv’s claims arise from these purposeful contacts with Texas. The trial in this litigation will focus on Walmart’s contacts with Texas (including its contacts with MCX and its Dallas meetings with Fintiv) to show at least when and how Walmart had knowingly and improperly acquired the trade secrets at issue. *See* Texas Uniform Trade Secrets Act, Tex. Civ. Prac. & Rem. Code § 134A.002. These purposeful contacts in Texas are directly pertinent to the proof of Fintiv’s claims in this litigation. *See Moncrief Oil*, 414 S.W.3d at 153-154. Even if the eventual creation or ***development*** of Walmart Pay occurred outside of Texas, as Walmart alleges, it is immaterial at least as to the improper ***acquisition*** of trade secret information that later enabled Walmart’s creation or development of Walmart Pay.

Furthermore, Walmart has indisputably profited from Walmart Pay within the State of Texas.

The Dallas meetings between Walmart/MCX and Fintiv are directly pertinent to the scope and details of Fintiv's proprietary information and know-how protected under secrecy that Walmart improperly acquired from Fintiv under the pretense of launching a business venture with Fintiv. These meetings provide some evidence of Walmart's motivation and premeditated decision for the misappropriation, as while it was meeting with Fintiv and receiving its trade secrets, and later siphoning additional trade secrets through its agent MCX, it was developing Walmart Pay with a third party and incorporating Fintiv's proprietary information into the application.

Additionally, the Dallas meetings between Walmart/MCX and Fintiv are relevant for showing Walmart's eventual disclosure or use of Fintiv's proprietary and confidential technical and business models, resulting in Walmart's unjustly gaining market share and benefits from launching new products and services such as Walmart Pay. These meetings are thus also pertinent to assessing the extent of Fintiv's damages in this litigation. *See* Texas Uniform Trade Secrets Act, Tex. Civ. Prac. & Rem. Code § 134A.004. Walmart chose to meet and engage with Fintiv, a Texas company, in Texas to discuss mobile wallets. It cannot now pretend those meetings did not happen and object to jurisdiction.

In summary, Walmart's contacts with Texas – directly and through its agent MCX – are sufficient to confer specific jurisdiction. *See, e.g., Daimler AG v. Bauman*, 571 U.S. 117, 127, n. 13 (2014). Walmart should have reasonably anticipated being hailed into a Texas Court, and it is not unreasonable to now require Walmart to litigate this case in Texas. *See Moncrief Oil*, 414 S.W.3d at 154.

The trial court's implicit finding of specific jurisdiction should be affirmed.

**B. There is a sufficient basis for finding Texas has general personal jurisdiction over Walmart.**

Though the record contains sufficient evidence supporting specific jurisdiction, making the general jurisdiction inquiry irrelevant, there is support for finding Walmart at home in the State of Texas.

To exercise general jurisdiction over a foreign defendant, that defendant must have continuous and systematic contacts with the forum state, and be essentially at home in the state. *Daimler*, 571 U.S. at 127. The Supreme Court of Texas has previously considered whether a defendant has bank accounts, offices, property, pays taxes, or employees in Texas to determine if it meets the test for general jurisdiction. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 73 (Tex. 2016).

Walmart maintains a substantial and pervasive physical presence in Texas, maintaining and operating a colossal number of approximately 600 stores in Texas, including 393 Supercenters in Texas. Indeed, Walmart maintains more stores in Texas than in any other state. Arkansas – in which Walmart is headquartered – has

a fraction of Walmart's Texas presence, with only approximately 130 stores, including 76 Supercenters. As of 2019, Walmart employed a massive number of over 160,970 employees in Texas, and was indeed ***the largest private employer in Texas***.

<https://www.businessinsider.com/the-biggest-employer-in-every-us-state-2017-11>.

In fact, Texas Walmart employees make up more than ten percent (10%) of 1.5 million Walmart employees across the United States.

Under similar facts, the Southern District of Illinois found general jurisdiction over Walmart in *Borders v. Wal-Mart Stores, Inc.*, No. 17-cv-0506, 2018 WL 9645780 (S.D. Il. Mar. 29, 2018). In denying Walmart's motion to dismiss for lack of personal jurisdiction, the court stated:

Walmart does more business and hires more workers in Illinois than it does in almost every other state in the country, including its paradigmatic home states of Arkansas and Delaware. Walmart has more employees and more stores and collects more taxes in Illinois than in Arkansas, its principal place of business. While it may not be true that Walmart would be at home in every state in which it does business, it is persuasive that, as a state with more associates and more stores than its "principal place of business," Walmart's business in Illinois is the "exceptional case" for general jurisdiction outside of a paradigmatic forum. Plaintiffs have made a prima facie showing of personal jurisdiction.

*Id.* at \*4.

Walmart's business in Texas is also the "exceptional" case for jurisdiction.

Additionally, Walmart has actively and continuously solicited Texas residents and hired employees in Texas for its stores thorough Texas. Walmart is registered to

do business in Texas and has an appointed agent for service of process. *See Del Castillo v. PMI Holdings N Am., Inc.*, No. 4:14-CV-3435, 2015 WL 3833447, at \*3–4 (S.D. Tex. June 22, 2015) (allowing general jurisdiction based on registration and agent for service of process). Walmart has also been providing the Walmart Pay service to shoppers at its stores, including Texas residents from its stores located throughout Texas.

Walmart’s contacts with Texas (*e.g.*, Walmart’s pervasive, physical presence in Texas, Walmart’s active hiring of employees in Texas, Walmart’s active advertisement in Texas) show high-quality and substantial contacts with Texas. For all of the reasons above, Walmart has continuous and systematic contacts with Texas and is essentially at home here, supporting the exercise of general jurisdiction.

### **PRAYER**

For the reasons stated above, Appellee Fintiv, Inc. requests the Court overrule Appellant’s issue, affirm the rulings of the trial court, and for any further relief to which it may be entitled.



Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 9.4 of the Texas Rules of Appellate Procedure, I certify that the word count in this Appellee's Brief is 10,378 words.

/s/ Jeffrey M. Tillotson

Jeffrey N. Tillotson

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 20, 2021, a copy of the foregoing was served on counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/ Jeffrey M. Tillotson

Jeffrey N. Tillotson

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